In the

SUPREME COURT of the UNITED STATES

October Term, 1967

No. 187

THE MENOMINEE TRIBE OF INDIANS, et al.

v.

THE UNITED STATES

REPLY BRIEF AND APPENDIX OF THE STATE OF WISCONSIN, AMICUS CURIAE ON RE-ARGUMENT

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CASES CITED

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REPLY BRIEF OF THE STATE OF WISCONSIN, AMICUS CURIAE ON RE-ARGUMENT

In the briefs filed to date, both the petitioner and the United States have based their arguments on what we regard to be an inappropriate premise. Both parties have addressed themselves to the question of where the treaty hunting and fishing rights now reside. The real import of the controversy, as we view it, is whether Congress can, by implication, deny to the State of Wisconsin a portion of its sovereignty, conferring it instead on a private corporation. This, we submit, is the end result of the positions advanced by the parties herein.

The brief of the petitioner on reargument raises no new questions regarding the legislative history of the Termination Act. It does, however, bring into the picture a

second corporate entity, "The Menominee Indian Tribe of Wisconsin, Inc.," which was established under Wisconsin's general nonprofit corporation law in 1962 by certain enrolled Menominees.[1] This corporation, the petitioner contends, is the true successor entity to the former Menominee Tribe and has assumed "ownership" of the special treaty hunting and fishing rights (Petitioner's Supplemental Brief, pp. 13-15). These rights, according to the petitioner, may be exercised within the boundaries of the 1854 reservation (Pet. Supp. Brief, p. 16).

The United States contends that the present enrolled members continue to share these rights among themselves, exercisable only on "communally" held lands (United States Supplemental Brief, p. 10).

I. REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF.

A. Formation of a new private corporation by certain Menominees cannot re-instate a tribal entity which Congress previously had extinguished.

Menominee Indian Tribe of Wisconsin, Inc. (hereafter referred to as the "tribal corporation") was incorporated under chapter 181, Wisconsin Statutes, in May, 1962, for the stated purpose, among others, of "re-establish (ing) the Menominee Indian Tribe of Wisconsin."[2] This purpose is also evident in the minutes of the organizational and other

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[1]The Articles of Incorporation reprinted in the appendix to Petitioner's Supplemental Brief, while containing the essential elements of the true articles, differ from those on file in the office of the Secretary of State of Wisconsin. Reference to the articles in this brief will be to the articles as filed, and as reproduced in Appendix A to this brief.

[2]Articles of Incorporation, Art. 3. See appendix, p. 1a.

meetings discussed by the petitioner.[3] This corporation is not, as petitioner would have it, the "suceessor" to the former Menominee Tribe. It is a private corporation organized under Wisconsin law by private citizens of the state.

In Wisconsin, as elsewhere, corporations are creatures of the state and possess only such powers as are authorized by law. *Fleischer v. Pelton Steel Co.* (1924), 183 Wis. 451, 455, 198 N. W. 441; *Brown Deer v. Milwaukee* (1962), 16 Wis. (2d) 206, 213, 114 N. W. (2d) 493, cert. den. 371 U. S. 902. A corporation cannot clothe itself with a power merely by naming it in its articles of incorporation. A corporation may do no act except in subordination to the laws of the state, for the exercise of corporate powers is subject to the general statutes of the state in which it is organized. See 19 Am. Jur. (2d), Corporations, pp. 434, 436, §§ 955, 957.

We have been unable to find any statutory authorization for the corporate exercise of powers such as those contemplated by the articles and bylaws of the tribal corporation[4]—which are, in essence, powers to hold and regulate special hunting and fishing rights. If, as petitioner argues, the treaty hunting and fishing rights survive in this corporation, the corporation then has the power to recognize or withhold them at will. In other words, the corporation would be able to confer upon virtually any-

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[3]Pet. Supp. Brief, pp. 9 et seq., Pet. Supp. App., pp. 132-134

[4]Sec. 181.04, Wis. Stats., sets out the powers of nonstock Wisconsin corporations

one[5] the right to hunt and fish free from state regulation within one of Wisconsin's 72 counties. As petitioner indicates at p. 13 of its Supplemental Brief, these rights are exercisable by "members"—and membership is not limited to Indians, much less to enrolled Menominees. In addition, the corporation may revoke such rights with regard to certain individuals, who would then "be fully subject to State hunting and fishing regulations" for "such period of time" as the corporation might specify.

Even petitioner concedes that the treaty rights cannot be conferred on a non-Indian,[6] yet non-Indian membership is precisely what is contemplated by the Articles of Incorporation of the same corporation which petitioner earlier contends is the successor entity to the tribe, insofar as possession of these rights is concerned.[7]

It is the position of the State of Wisconsin that the Termination Act unequivocally cut off these rights. The subsequent action of all 3270 enrolled Menominees could not alter this fact—nor can the action of less than 100[8] Menominees in forming a corporation change the effect of this Congressional action.

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[5]The Articles of Incorporation permit any person—whether Indian or non-Indian—to become a member. See Article 10, Appendix, pp. 2a-3a.

[6]Pet. Supp. Brief, p. 16

[7]Ibid., p. 13

[8]Ibid., p. B 6 (Appendix)

B. The effect of the Termination Act was to abolish the Menominee Tribe as a recognizable entity and to destroy the reservation status of the lands.

We have set forth our position in this regard in the opening brief. However, because of the discussion on pp. 16-19 of the petitioner's brief, the following statement is offered.

We agree that the Termination Act does not expressly state that "the Menominee Tribe is hereby abolished for any and all purposes." The effect of the act, however, is obvious. All vestiges of tribal existence as a political entity have been dissolved, and what was formerly the reservation is now a duly organized Wisconsin County. The lands have been conveyed to a private corporation, Menominee Enterprises, Inc. These and the other matters discussed in our opening brief indicate the *de facto* abolition of the Indian status of the Menominees and their lands.

Petitioner argues that if Congress had intended to terminate tribal existence it could have said so, as it did in the Choctaw Termination Act (Pet. Supp. Brief, p. 19). The simple fact is that, when brought to finality in 1961, the Act did terminate tribal existence. We might also suggest that if Congress had intended to "preserve" certain rights in the Menominee Act, it could have so stated—as it did in the Klamath, Ute, Paiute, Wyandotte and Ottawa Termination Acts.[9]

We submit that the discussion of the Klamath and Flathead Acts on pp. 18-19 and 21-23 of the Petitioner's Supplemental Brief is wholly irrelevant to the questions now before this court.

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[9]25 U. S. C. §§ 564, 677r, 757, 806 and 851.

C. The rights granted to the Menominees in the 1854 treaty are in the nature of land-use privileges and cannot survive a conveyance in fee of the tribal lands to a private corporation.

The United States conveyed title to all reservation land—forest and otherwise—to Menominee Enterprises, Inc., a private stock corporation. Menominee Enterprises, as a corporation, is an entity separate and distinct from its shareholders. *Jonas v. State* (1963), 19 Wis. (2d) 638, 644, 121 N. W. (2d) 235; *North Gate Corp. v. National Food Stores* (1966), 30 Wis. (2d) 317, 324, 140 N. W. (2d) 744. In legal form, Menominee Enterprises, Inc., is no different from any other Wisconsin corporation. As a result, the effect of the conveyance of reservation lands is similar to the issuance of a patent to a non-Indian. Any rights to hunt and fish such lands would be analogous to the "off-reservation hunting rights" which were held subject to state regulation in *Ward v. Race Horse* (1896), 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244, and succeeding cases. See Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504 (1964). See also *State v. Johnson* discussed at pp. 42-43 of the State of Wisconsin's opening brief on re-argument.

The treaty from which the Menominee rights were derived states (10 Stat. 1064):

> "* * * The United States * * * do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country * * *"

The United States, through the Wolf River Treaty, did not give the Menominees any rights other than those relating to the use or "holding" of certain lands. What was given

was land, together with a privilege of unrestricted use of the land for hunting and fishing. This was the way Indian lands were "held" in 1854, and the language of the treaty reserved to the Menominees the right to so "hold" the reservation lands. Petitioner's argument would have these privileges not only survive the patent of reservation lands to a private corporation (and to certain individuals)—but would extend them to anyone who might hereafter be admitted to membership in the 1962 "tribal" corporation. The lands are no longer "held as Indian lands are held." They are in private ownership, are on the tax rolls and comprise a duly organized Wisconsin county.

Petitioner greatly expands the language of the treaty by asserting that the rights conferred thereby are not dependent upon the land (which, after all, was the sole subject of the treaty), but rather are based upon the Menominees' status as Indians (Pet. Supp. Brief, p. 15). It is precisely this status, and the concomitant trust relationship, that Congress was attempting to terminate in the 1954 Act—even if that act is construed in the most restrictive and narrow manner imaginable.[10]

If, as petitioner contends,[11] the surviving treaty rights would not outlast "termination of the tribe as an entity," the State of Wisconsin is still in an impossible position.

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[10]See, for example, 25 U. S. C. § 899, and the April 29, 1961, proclamation of the Secretary of the Interior, both of which provide that, after termination:

> ". . . individual members of the Menominee Tribe *shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable* to the members of the Menominee Tribe; *and the laws of the several States shall apply to the Menominee Tribe and its members* in the same manner as they apply to other citizens or persons within their jurisdiction." (Emphasis added)

[11]Pet. Supp. Brief, p. 15.

Petitioner argues in another portion of its brief that the "tribal entity" survives in a new tribal corporation—a corportion whose membership (and presumably eligibility to exercise the treaty rights) is dependent only upon the whim of those participating in its affairs. What affairs these might be, and who is presently a "member," is unknown. In addition, the participants can "revoke" individual treaty privileges for an indeterminate period of time.

The "tribal corporation" which is now claimed to have succeeded to ownership of the treaty hunting and fishing rights was not even in existence for more than a year after final termination. It was in no way contemplated by either the terms of the act or the approved plan. Under its statutory powers, the corportion is free to sell, pledge, or otherwise dispose of its assets—which presumably include the hunting and fishing rights. See sec. 181.04 (5), Wis. Stats.

The idea of preserving treaty rights in a corporation organized by a few Menominees as an afterthought to termination is repugnant not only to the fact of termination, but also to the terms of the treaty itself.

II. REPLY TO SUPPLEMENTAL BRIEF OF THE UNITED STATES.

The first portion of the government's brief, particularly pp. 6-7, appears to assert that the State of Wisconsin has, as a result of the Termination Act, assumed the "trustee" role previously played by the United States, and may regulate to the same extent as the federal government prior to termination. Whether the federal government ever had such authority is certainly open to question. See Supplemental Brief of the Petitioner, pp. 19-20. Certainly

it cannot be claimed that the State of Wisconsin is now endowed with the wardship which was so effectively terminated by Congress.

On p. 4 of its Supplemental Brief, the government implies that an Indian treaty is somehow paramount to federal statutes. This is not so.[12]

The government's brief refers in several places to "the reservation," "The Tribe," "the lands of the tribe," "Indian lands," etc. As we have stated, the lands are now in private ownership, are taxed by the state, and the reservation no longer exists. There are no more "communally held" lands—the only lands to which the government would extend the treaty rights.

III. THE STATE OF WISCONSIN HAS A SOVEREIGN INTEREST IN THE REGULATION OF HUNTING AND FISHING WHICH CANNOT BE TAKEN AWAY BY CONGRESSIONAL IMPLICATION AND GIVEN TO A PRIVATE ENTITY.

Wisconsin law has long recognized the proposition that title to all fish and game within its borders is held by the state, in its sovereign capacity, for the benefit of all its people. *Krenz v. Nichols* (1928), 197 Wis. 394, 222 N. W. 300; *State v. Lipinske* (1933), 212 Wis. 421, 424-5, 249 N. W. 289. See also *La Coste v. Louisiana* (1923), 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437. Similarly, the State of Wisconsin, by virtue of the Northwest Ordinance of 1787 and Sec. 1, Art. IX, of its own constitution, holds all rights incidental to public use of navigable waters—which includes hunting and fishing uses—in trust for all the people. *Nekoosa-*

[12]See our opening brief on reargument, pp. 8-9

Edwards Paper Co. v. Railroad Comm. (1930), 201 Wis. 40, 48, 228 N. W. 144, 229 N. W. 631, Affirmed 283 U. S. 787; *Muench v. Public Service Commission* (1952), 261 Wis. 492, 499-502, 507-508, 53 N. W. (2d) 514, 55 N. W. (2d) 40.

The regulation of hunting and fishing is an attribute of sovereignty and is also a duty imposed upon the State of Wisconsin as trustee of the waters, fish and wildlife within its borders. *LeClair v. Swift* (D. C. Wis. 1948), 76 F. Supp. 729. All citizens of Wisconsin, as beneficiaries of this trust, have rights in the state's wildlife resources.

In addition, the State of Wisconsin was admitted to the Union in 1848 on an equal footing with all other states. This is contrary to any notion that Congress intended to admit the State of Wisconsin with diminished sovereignty insofar as authority over its lands, waters and wildlife is concerned. See *Ward v. Race Horse* (1896), 163 U. S. 504, 515-516, 16 S. Ct. 1076, 41 L. Ed. 244.

This trust attribute of sovereignty attached to the lands (and waters) in question prior to the 1854 Treaty, as did the sovereign right of the state, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its borders. *State v. Nergaard* (1905), 124 Wis. 414, 420, 102 N. W. 899.

The navigable waters trust doctrine, having its basis in the Northwest Ordinance, is peculiar to the states forming the Northwest Territory, and is not recognized in many Western states where some of the cases discussed by the petitioner arose.

Moreover, the State of Wisconsin has never surrendered its sovereignty over Indian lands. Many other states—including Washington, Oklahoma, Utah, Arizona, New Mexi-

co, Idaho, North Dakota and South Dakota--adopted constitutions which expressly relinquished state jurisdiction over Indian lands. [13] Wisconsin's constitution contains no such provision.[14] Similarly, the act admitting Wisconsin to the Union[15] is silent on the preservation of Indian rights, whereas the Alaska,[16] Washington, Montana, North Dakota and South Dakota[17] statehood and enabling acts contain express declinations of jurisdiction over Indian property and certain Indian rights.

During the period of federal trusteeship over the land and people of the Menominee Tribe (1854-1961) the federal government, as owner of the land and guardian of the people, stood between the state and the Indian "wards". The sovereignty of the state was not surrendered during this period. The exclusion of state jurisdiction was more in the nature of a prohibition against trespassing on the reservation for the purpose of enforcing the fish and game laws. By passage of the Termination Act, Congress has completely abolished its role as trustee and guardian, and has returned both the reservation land and the Menominee people to full citizenship status. The state sovereignty is now complete and unimpaired.

What the petitioner (and the government) are saying is that the Termination Act, without so stating, has vested this sovereign power in a private corporation subse-

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[13]Washington Constitution, Art. XXVI, Oklahoma Constitution, Art. I, sec. 3; Utah Constitution, Art. III, sec. 1; Arizona Constitution, Art. XX, sec. 4; New Mexico Constitution, Art. XXI, sec. 2; Idaho Constitution, Art. XXI, sec. 19; North Dakota Constitution, Art. XVI, sec. 203; South Dakota Constitution, Art. XX.

[14]See Wisconsin Constitution, Arts. II and IX.

[15]9 Stat. 283

[16]72 Stat. 339

[17]A single enabling act, 25 Stat. 676, applied to Washington, Montana, North Dakota and South Dakota.

quently formed by private citizens. We most firmly disagree with such a contention, and respectfully urge this court to reverse the judgment of the Court of Claims.

Respectfully submitted,

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